

**CALIFORNIA ENERGY COMMISSION**

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**STATE OF CALIFORNIA**
**Energy Resources Conservation  
 and Development Commission**

<b>In the Matter of:</b>	)	<b>Docket No. 99-SIT-2</b>
	)	
<b>Midway Sunset Cogeneration Company's</b>	)	<b>COMMITTEE PROPOSED DECISION</b>
<b>Petition for Jurisdictional Determination</b>	)	<b>RE: NOI EXEMPTION</b>
_____	)	

**I. THE PROJECT**

Midway Sunset Cogeneration Company (Petitioner or MSCC) proposes to develop, finance, construct and operate a 500 megawatt (MW) natural gas-fired combined cycle power plant that is a market-based response to the creation of the California Power Exchange (PX). The proposed project will be located near the town of Fellows in Kern County, adjacent to the western boundary of the existing Commission-certified 225 MW Midway Sunset cogeneration project, approximately 40 miles west of the city of Bakersfield. Petitioner will participate in the competitive electricity marketplace and expects to sell all or some of the project's electricity output through the PX and other power-marketing outlets.

**II. PROCEDURAL HISTORY**

On February 5, 1999, Petitioner filed a "Petition for Jurisdictional Determination" requesting that the Commission find the MSCC power plant project eligible for an exemption from the Notice of Intention (NOI) requirements of Public Resources Code (PRC) section 25502. Petitioner asserts

that its project conforms with the provisions of Public Resources Code (PRC) section 25540.6(a)(1) which exempts certain power plant projects from the NOI process.

On November 4, 1998, the Commission adopted certain findings in the *Blythe Energy* Decision as precedential for NOI exemption proceedings.<sup>1</sup> In that Decision, the Commission also indicated that Petitions for NOI exemptions may be reviewed on the basis of sworn testimony in lieu of evidentiary hearings.

By Notice dated February 11, 1999, the Energy Facility Siting Committee scheduled a hearing on the Petition before the full Commission at its March 31, 1999 Business Meeting. In accord with Commission regulations,<sup>2</sup> the Committee served the Notice and Petition upon the individuals, organizations, and businesses identified by Petitioner as “interested parties,” as well as upon other persons and entities appearing on pertinent mailing lists. The Notice directed all entities wishing to participate in the proceeding to file written statements by March 3, 1999. The Notice also directed Petitioner to provide responses to several inquiries regarding its assertion that the proposed project qualifies for an NOI exemption. Petitioner filed its responses as sworn testimony. Commission Staff also filed a statement pursuant to the Notice.

On March 16, 1999, the Committee issued this Proposed Decision which is based on the sworn testimony filed by Petitioner, and the statement submitted by Staff. The Proposed Decision was served on Petitioner and all interested parties for review and comment prior to the Commission’s March 31<sup>st</sup> hearing on the matter.

### **III. APPLICABLE LAW**

#### **A. Statutory Requirements.**

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<sup>1</sup> Docket No. 98-SIT-2; CEC Publication No. P800-98-004.

<sup>2</sup> Title 20, Cal. Code of Regs., Section 1232.

Public Resources Code section 25502 provides in pertinent part that:

Each person proposing to construct a thermal powerplant...shall submit to the commission a notice of intention [NOI] to file an application for the certification of the site and related facility or facilities.<sup>3</sup>

The purpose of the NOI is to provide an open planning process in which the project proponent, interested agencies, and members of the public have an opportunity to review the principal environmental, public health and safety, socioeconomic, and technological advantages and disadvantages of potential sites for a proposed project. (Cal. Code of Regs., tit. 20, § 1721). The NOI process also reviews whether a proposed project conforms with the Commission's assessment of electricity demand adopted pursuant to Section 25305 et seq. of the Public Resources Code. (PRC, § 25502).

Successful completion of the NOI process is a prerequisite to the second stage of power plant licensing, i.e., the Application for Certification (AFC). Public Resources Code section 25540.6, however, *exempts* certain projects from the NOI process and allows them to proceed directly to the AFC stage.<sup>4</sup> Projects eligible for this expedited licensing process include:

...a thermal powerplant which is the result of a competitive solicitation or negotiation for new generation resources and will employ natural gas-fired technology... . (PRC, § 25540.6(a)(1).)<sup>5</sup>

Petitioner contends its proposed project fits within this provision.

## **B. Policy Guidance.**

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<sup>3</sup> The Commission generally has 12 months from the time an NOI filing is accepted in which to conduct this review. (PRC, § 25516.6(a).)

<sup>4</sup> The AFC process anticipates a *final* licensing decision within 12 months of filing an application. See, PRC, § 25540.6(a).

<sup>5</sup> PRC, § 25540.6 lists several specific NOI exemptions that include: cogeneration, solar, modification of a specific facility, site specific, less than 100 MW, and demonstration projects.

The Commission has authority to interpret pertinent statutory or regulatory provisions. Typically, such Commission policy is expressed in its biennial Electricity Report (*ER*), the most recently adopted of which is controlling for power plant proposals filed during an *ER*'s operative life. (PRC, §§ 25309 and 25523(f)). In the present instance, this guidance appears as part of the 1996 *ER* in which the Commission stated:

For gas-fired powerplants which are the result of competitive solicitations or negotiations, we will continue our process [announced in the Addendum to *ER 94*] for granting exemptions from NOI requirements to such projects. (*ER 96*, p. 75, Endnote 1).

The policy expressed in *ER 94* and the Addendum to *ER 94* supported the development of a competitive market in the production and sales of electricity. The Addendum clarified Commission policy on legislation amending Section 25540.6 to allow NOI exemptions for natural gas-fired projects that are “the result of a competitive solicitation or negotiation.” (AB 1884; Statutes of 1993).<sup>6</sup> In the Addendum, the Commission expressed its preference for a “...broad construction of what it means to be 'the result of a competitive solicitation or negotiation'.”<sup>7</sup> In *ER 96*, the Commission expanded the views contained in *ER 94* and the *ER 94* Addendum to encourage the development of merchant power plants that participate in the newly emerging electricity marketplace without the benefit of ratepayer guarantees. (*ER 96* at pp. 71-72). Until the *Blythe Energy* Decision was issued, formal Commission policy on NOI exemptions was limited to these Electricity Reports.<sup>8</sup>

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<sup>6</sup> The Legislative Counsel's Digest for AB 1884 states that the amendments were intended to change the statute to conform to the present-day competitive marketplace of energy development. “[T]he siting provisions of the Act were written at a time when large baseload powerplants were the types of plants being considered by the Commission and when competition between utilities and second party power producers was nonexistent.” (Leg. Counsel's Digest, Bill Analysis for AB 1884, Third Reading, April 12, 1993). At the time AB 1884 was adopted, the federal Public Utilities Regulatory Policy Act (PURPA) and other related state laws had established a process (Biennial Plan Report Update or BRPU) to allow regulated public utilities and independent power producers to compete in the marketplace through a competitive bid process in order to meet demand. (*Ibid.*; 8/27/93 Senate Analysis).

<sup>7</sup> *ER 94* Addendum, Revision 1, p. 2.

<sup>8</sup> See, *Blythe Energy*, pp. 3-6 for a more complete discussion of the NOI exemption policies contained in *ER 94* and *ER 96*.

### C. Precedential Decision

In *Blythe Energy*, the Commission further interpreted the scope of its policies pertaining to NOI exemptions, and determined that a natural gas-fired merchant project which proposes to sell its power in the competitive electricity market, and does not put ratepayers at risk, would generally be eligible for an NOI exemption. The Commission declared the following Findings as *Precedent*:<sup>9</sup>

- 1) The Commission adopted an “Addendum to the 1994 Electricity Report” on February 14, 1996.
- 2) This Addendum sets forth policies and procedures which apply to the interpretation of Public Resources Code (PRC) section 25540.6(a)(1) and are, on a case-by-case basis, specifically applicable to individual Petitions seeking an exemption from the Notice of Intention (NOI) provisions of PRC, § 25502.
- 3) The Commission adopted the 1996 Electricity Report (*ER*) which continued the policies set forth in *ER 94* and in the Addendum.
- 4) The California Power Exchange (PX) was created by AB 1890 to provide an efficient “competitive auction” open to all power producers, resulting in competitive market pricing at no risk to ratepayers. (Pub. Util. Code, § 355).
- 5) The creation of the PX, which promotes a competitive wholesale market, may be viewed as a continuing series of solicitations and negotiations, which are of the type reasonably envisioned by the policy expressed in the Addendum and PRC, § 25540.6(a)(1).
- 6) The PX market, which began the competitive auction on March 31 1998, replaced the solicitation process that existed under the Biennial Report Plan Update (BRPU).

In addition, the Commission found that power sales to the PX are the “result of a competitive solicitation or negotiation for new generation resources” within the meaning of PRC, § 25540.6(a)(1).<sup>10</sup> This finding includes natural gas-fired projects that sell power to other power

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<sup>9</sup> *Blythe Energy*, pp. 18-19.

<sup>10</sup> Commission Order adopting *Blythe Energy* (Order No. 98-1104-04); see also, *Blythe Energy*, pp. 17-18.

exchanges and/or wholesale, and/or retail marketers, and/or direct access power markets, and/or other power consumers.<sup>11</sup>

#### IV. EVIDENCE OF RECORD

The *Blythe Energy* Decision provides that a Petitioner may establish eligibility for an NOI exemption by filing sworn testimony in response to certain specific inquiries enumerated in that Decision.<sup>12</sup> In consideration of the issues raised in the instant Petition, the Committee directed Petitioner to respond to those inquiries as follows:<sup>13</sup>

1. Describe the specific nexus between the particular project proposed by Petitioner and the PX's solicitations for "day ahead" and "hourly bids". How is the proposed project anticipated to perform under both scenarios regarding its baseload and peaking capacities?
2. Is Petitioner negotiating with any other potential power exchanges or power purchasers, including wholesale and/or retail markets?
3. What is Petitioner's registration status at the PX? If Petitioner has not begun the registration process, what are Petitioner's plans regarding registration and negotiation for a "PX Participation Agreement?"
4. Identify Petitioner's principal corporate owners and/or other entities or individuals who are legally and financially responsible for the development, construction, and operation of the proposed project.
5. Describe Petitioner's experience and assets with regard to power generation acquisition, and power plant development, ownership, and operation; and, if the project proponents do not have such experience, identify the entity or entities that will be responsible for development, construction, and operation of the power plant facility.
6. Describe the specific site location where the project will be constructed, and describe Petitioner's site selection criteria that led to this particular site location; also, include the locations of any other existing or proposed power plant projects that are or will be

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.*, fn. 27 at p. 18.

<sup>13</sup> See, February 2, 1999, Notice of Commission Hearing.

connected to the PG&E's Midway Sunset Substation at Buttonwillow by the summer of 2002.

7. Provide evidence describing the project components sufficiently to establish that the proposed facility is a natural gas-fired power plant.
8. Provide evidence to establish that the proposed project can be developed and operated without the benefit of ratepayer support or guarantees.
9. Explain how Petitioner's negotiations may be affected by the Independent System Operator's "congestion" and "ancillary services" market activities.

Petitioner. Petitioner responded to the inquiries in its March 10, 1999, Responses to the Committee.<sup>14</sup> The responses were executed under penalty of perjury by Edmond Western, Executive Director of the Midway Sunset Cogeneration Company. The Committee reviewed the sworn responses submitted by Petitioner and based its Findings and Conclusions upon that submittal, in lieu of an evidentiary hearing.

Staff. Staff agreed with Petitioner's assertions that the proposed merchant project is a natural gas-fired power plant that meets the statutory test for being the result of a competitive solicitation. (Staff Statement filed March 1, 1999). Staff expressed its belief that existing Commission policy and previous NOI exemption cases support such a conclusion.<sup>15</sup> (*Ibid.*)

There were no other comments or other evidence filed in this matter.

## **V. FINDINGS and CONCLUSIONS**

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<sup>14</sup> Although the Responses were due on March 3, 1999, the Committee accepted the Petitioner's late filing since the Petitioner did not timely receive the Notice that was originally mailed on February 11, 1999.

<sup>15</sup> Staff cites the Commission's Decisions in *Blythe Energy*, *supra*, and in *La Paloma* (98-SIT-1; CEC Publication No. P800-98-003) and cases cited therein.

Based upon the precedent established in *Blythe Energy*, and in the absence of any contravening evidence, the Committee finds that the proposed MSCC power plant is the “result of a competitive solicitation or negotiation” within the meaning of PRC, § 25540.6(a)(1).

Based on the totality of the record, we make the following findings and conclusions:

- 1) Midway Sunset Cogeneration Company (Petitioner or MSCC) filed a Petition seeking an exemption from the Notice of Intention (NOI) process in accord with the policy guidance set forth in the *ER 94* Addendum, *ER 96*, and the *Blythe Energy* Decision, and in compliance with the requirements of Title 20, California Code of Regulations, sections 1230, et seq.
- 2) Midway Sunset Cogeneration Company (MSCC), which owns and operates an existing cogeneration project in Kern County, is a California General Partnership: 50 percent owned by San Joaquin Energy; 49 percent owned by AERA Energy, LLC; and 1 percent owned by the Atlantic Richfield Company (ARCO). San Joaquin Energy, a wholly owned subsidiary of Edison Mission Energy, develops, owns, and operates power projects worldwide with interests in 55 projects totaling more than 13,400 MW. Edison Mission O&M, a subsidiary of Edison Mission Energy, operates MSCC’s existing 225 MW cogeneration project which began commercial operations in 1989 under Commission certification (85-AFC-3). MSCC holds QF contracts with Southern California Edison (SCE) and Pacific Gas & Electric (PG&E); a contract with AERA to supply field operations; and is an active participant in the California Power Exchange (PX).
- 3) Petitioner proposes to construct a natural gas-fired combined cycle power plant, nominally rated at 500 MW (MSCC Power Plant) adjacent to Petitioner’s existing cogeneration project. Major equipment for the project is typical of natural gas-fired power plants, including two advanced combustion turbine generators (CTGs) fueled by natural gas, and supporting equipment, utilizing much of the existing infrastructure already in place at the cogeneration project.
- 4) The proposed MSCC Power Plant will be located near the town of Fellows in Kern County, adjacent to the western boundary of the existing cogeneration project approximately 40 miles west of the city of Bakersfield. The site is specifically located in the south half of the southeast quarter of section 17, township 31 south, range 22 east, Mount Diablo Meridian.
- 5) The site was selected to take advantage of the existing power project infrastructure and to minimize environmental impacts. There are two major natural gas pipelines adjacent to the site. MSCC will construct a 230kV transmission line parallel with the existing line and on the same right-of-way to interconnect the new project to the existing 230kV PG&E breaker located at PG&E’s substation at Buttonwillow. Other proposed projects that are planning to connect to the Buttonwillow substation in 2002 include Elk Hills, La Paloma, Morro Bay, and Sunrise Cogeneration.



- 6) The proposed MSCC Power Plant is a market-based response to the deregulation of California's electricity industry. Petitioner expects that power produced by the project will be sold through the PX, and through bilateral sales in other wholesale and retail power-marketing outlets.
- 7) The MSCC Power Plant is designed as a baseload facility to provide operating flexibility in response to the PX's "day ahead" and "day of markets" bidding processes. The baseload or peaking capabilities of the project could also be utilized in the ancillary services market conducted by the California Independent System Operator (ISO).
- 8) Petitioner expects that the proposed project will be subject to the eventual grid management standard chosen by the ISO to determine congestion impacts caused by the addition of new generation. Petitioner also anticipates that its negotiations for power sales may be affected if the ISO mandates the installation of the "Generator Communication System" on all ancillary service providers.
- 9) The proposed MSCC Power Plant is a merchant project that is not eligible for ratepayer support mechanisms. The proposed project will be financed, built, and operated with private funds that the owners will provide entirely at their own risk.
- 10) Petitioner has an existing Participation Agreement with the PX, and was one of the original PX participants on opening day, March 31, 1998.

We conclude, therefore, that Petitioner's proposed natural gas-fired power plant project is the "result of a competitive solicitation or negotiation" for the sale of its electric power. Under these circumstances, and in light of the factors mentioned above and discussed elsewhere in this Decision, and based on the precedent established in the *Blythe Energy* Decision, the prospective MSCC Power Plant qualifies for an exemption from the Notice of Intention as set forth in Public Resources Code section 25540.6(a)(1).

Dated: \_\_\_\_\_

ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

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ROBERT A. LAURIE  
Commissioner and Presiding Member  
Energy Facility Siting Committee

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DAVID A. ROHY, Ph.D.  
Vice Chair and Associate Member  
Energy Facility Siting Committee

**APPENDIX A**

**EVIDENCE OF RECORD**

**STATE OF CALIFORNIA**

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<b>Petition for Jurisdictional Determination</b>	)	<b>RE: NOI EXEMPTION</b>
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**EVIDENCE OF RECORD**

<u>Exhibit</u>	<u>Date</u>	<u>Document</u>
1	February 5, 1999	Petition for Jurisdictional Determination filed by Midway Sunset Cogeneration Company
2	March 1, 1999	Energy Commission Staff Statement filed by Energy Commission Staff
3	March 10, 1999	Responses to Energy Facility Siting Committee's Inquiries 1 through 9, filed by Midway Sunset Cogeneration Company

## **APPENDIX B**

### **PROOF OF SERVICE LIST**